In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 784

ANTONIA SENTNER, APPELLANT

v.

LEWIS D. BARTON, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DISTRICT No. 11

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO DISMISS CROSS-APPEAL

The Solicitor General, on behalf of Lewis D. Barton, the above-named appellee, moves to dismiss the cross-appeal filed by Antonia D. Sentner as untimely under 28 U. S. C. 2101.

The order of the three-judge district court, granting in part and denying in part an injunction in this case, was entered November 2, 1956. Notice of appeal by Lewis D. Barton from that order and from conclusions of law Nos. IX, X, XI, XIII, XV, XVIII, XIX embodied in the order (See Jurisdictional Statement filed in No. 728) was filed November 30, 1956. Appellant's notice of cross-appeal from the

order and from conclusions of law VII, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XX was not filed until December 19, 1956. Since that notice was filed more than 30 days after the order of the district court, it was out of time under 28 U. S. C. 2101. See also Rule 11 (3) of the Rules of this Court.

Some of the questions which appellant has tried to raise by her cross-petition will remain available to her in answer to the issues raised by the government's appeal in this case. The following are, however, separate from the issues raised on the government's appeal and therefore not validly brought before the Court by this attempted cross-appeal:

1. The holding that paragraphs 1, 2 and 9 of the order of supervision do not present a justiciable controversy at this stage (Question 4 and part of Question 5 of the notice of cross-appeal, Conclusions of Law VII and XVII).

2. The holding that paragraphs 3 (a) and 4 of the order of supervision are valid (Part of Question 5 of the notice of cross-appeal, Conclusions of Law XII, XIV and part of XX (2)).

3. Question 1 of the notice of cross-appeal, which seeks to raise, without reference to any conclusion of law, the issue as to whether petitioner can be threatened with criminal prosecution because she refuses to leave her citizen husband, who is a Communist.

It should be noted that this last question (Question 1 of the notice of cross-appeal) is not properly before this Court without regard to the issue of timeliness. Paragraph 11 of the original complaint (R. 4) which

made allegations that such action had been threatened and which was denied by the government in its answer (R. 27) was withdrawn by the plaintiff so that there would be no issue of fact to preclude summary judgment (R. 38). Plaintiff did argue that the effect of the order of supervision was to bring about the same result even though by the amended order it was specifically provided that she was not barred from associating with her husband because paragraph 7 of the order of supervision provided that family associations were not barred "if such associations are not used in furtherance of the doctrines, policies, or activities" of the proscribed organization. But the validity of that provision is far different from the question which plaintiff seeks to present.

CONCLUSION

It is respectfully submitted that the cross-appeal should be dismissed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1957.

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ANTONIA SENTNER, Appellant,

v.

LEWIS D. BARTON, District Director, United States Immigration and Naturalization Service District No. 11.

Cross-Appeal from the United States District Court for the Eastern District of Missouri.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS CROSS-APPEAL.

The appellant on this cross-appeal respectfully submits that the Solicitor General is in error when he states that her cross-appeal is untimely under 28 U. S. C. 2101.

We concede that appellant's notice of cross-appeal was filed more than 30 days after the order of the district court. However, it was filed less than 60 days after said order.

The order of the district court did not hold unconstitutional in whole or in part any act of Congress. Said order

was not an interlocutory order, but was a final order and judgment.

Therefore, appellant's notice of cross-appeal, which was filed within 60 days of said order, was timely filed under 28 U. S. C. 2101 which provides:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within 30 days after the entry of the interlocutory or final order, judgment or decree. * * *
>
> "(b) Any other direct appeal to the Supreme Court, which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within 30 days from the judgment, order or decree appealed from, if interlocutory, **and within 60 days if final.**
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> "* * *" (Emphasis supplied.)

Appellant would also respectfully point out that, contrary to the position taken by the Solicitor General, Question 1 set out in her notice of cross-appeal is properly before this Court on the original appeal, as well as on this cross-appeal.

While the appellee is correct that paragraph 11 of the Original complaint was withdrawn by the plaintiff, the first temporary restraining order, which was issued December 17, 1953, states that the district court found "that the plaintiff is threatened with immediate criminal prosecution by virtue of the defendant's attempts to enforce his order of supervision and parole of October 9, 1953 which he has heretofore issued against the plaintiff; . . ." The original order of supervision was modified by the defendant, but this modification did not affect this finding

of fact, and the district court therefore issued a new restraining order on January 23, 1956 after such modification. Plaintiff's withdrawal of paragraph 11 of her complaint withdrew only the allegations that the then defendant made certain oral statements; she reasserted the risk of prosecution in paragraph 5 of her reply; and there was no withdrawal of the fact found by the district court that criminal prosecution was threatened.

Appellant would further point out that this is a cross-appeal and that its purpose is to insure that all aspects of the questions raised by this case will be brought before this Court for its decision. Dismissal of appellant's cross-appeal would unduly restrict the scope of the issues on appeal and this Court's examination of the alleged unconstitutionality of Section 242 (d) of the McCarran-Walter Act.

CONCLUSION.

The cross-appeal should not be dismissed.

Respectfully submitted,

SYDNEY L. BERGER,
R. L. WITHERSPOON,
Attorneys for Cross-Appellant.

March, 1957.